

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

No. 87-1762

Supreme Court, U.S.

FILED

JUN 22 1988

JOSEPH F. SPANIOLO, JR.
CLERK

JOHN E. ELLIS,
Petitioner

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

RESPONDENT'S MEMORANDUM IN OPPOSITION
TO PETITION FOR A WRIT OF HABEAS CORPUS
TO THE APPEALS COURT FOR THE
COMMONWEALTH OF MASSACHUSETTS

JAMES M. SHANNON
Attorney General

Michael W. Dingle*
Robert M. Mendillo
Assistant Attorneys General
Criminal Bureau
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

*Counsel of Record

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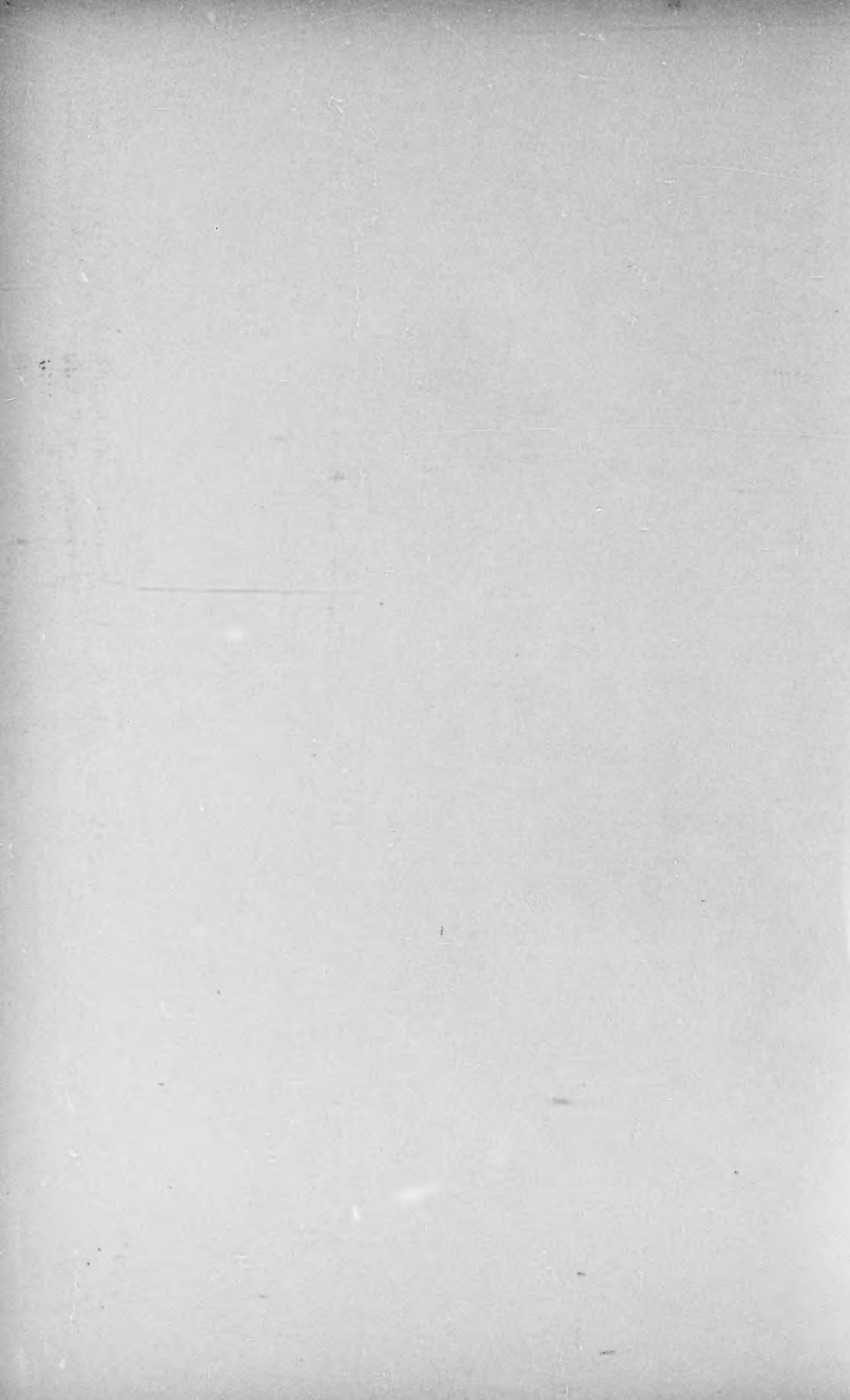


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Respondent, the Commonwealth of
Massachusetts, respectfully requests
this Court to deny the petition for writ
of certiorari, seeking review of the
February 3, 1988 decision of the Appeals
Court for the Commonwealth of
Massachusetts.

REASONS WHY THE PETITION
SHOULD BE DENIED.

This Court Does Not Have
Jurisdiction To Review The Decision
Of The Appeals Court Of The
Commonwealth of Massachusetts
Because It Is Not A Final Judgment
Rendered By The Highest Court Of The
Commonwealth.

The petitioner requests this Court to review the February 3, 1988 judgment of the Appeals Court for the Commonwealth of Massachusetts in Commonwealth v. John E. Ellis.

(Appendix, 1a-6a; 25 Mass. App. Ct. 1101 (1988)). After that judgment was rendered, petitioner had twenty (20) days to file, under Rule 27.1(a) of the Massachusetts Rules of Appellate Procedure, an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court of the Commonwealth of Massachusetts. Rule 27.1(a) provides:

Within twenty days after the date of the rescript of the Appeals Court

any party to the appeal may file an application to obtain further appellate review of the case by the full Supreme Judicial Court. Such application shall be founded upon substantial reasons affecting the public interest or the interests of justice. Oral argument in support of an application shall not be permitted except by order of the court.

Rule 27.1(a) regulates an Appellate Court party's right to seek further appellate review under Mass. Gen. Laws ch. 211A, §11, which provides:

There shall be no further appellate review by the supreme judicial court of any matter within the jurisdiction of the appeals court which has been decided by the court, except: - (a) where a majority of the justices of the appeals court deciding the case, or of the appeals court as a whole, certifies that the public interest or the interests of justice make desirable a further appellate review, or (b) where leave to obtain further appellate review or late review is specifically authorized by three justices of the supreme judicial court for substantial reasons affecting the public interest or the interests of justice. Upon the written order of a majority of the justices of the appeals court, the decision of a

panel of the appeals court may be reviewed and revised by a majority of the justices of the appeals court. Such a review shall not be a condition precedent to obtaining further appellate review by the supreme judicial court."

Petitioner did not file such an application: his jurisdictional statement does not state that he did (Pet. at 2), and his counsel has admitted to respondent's counsel that no such application was filed.

By failing to seek further appellate review in the Supreme Judicial Court, the petition comes before this Court in violation of 28 U.S.C. § 1257, because petitioner did not seek to have the Appeals Court decision reviewed "by the highest court of a State in which a decision could be had." Thus, this Court does not have jurisdiction to review the decision of the Appeals Court. Banks v. California, 395 U.S.

708 (1969) (petition for certiorari to California Court of Appeal dismissed for want of jurisdiction because petitioner had not asked California Supreme Court to review judgment, and thus decision was not a final judgment rendered by highest court of state); Stratton v. Stratton, 329 U.S. 55, 56-57 (1915) (a judgment rendered by an intermediate appellate state court cannot be reviewed by the United States Supreme Court where the highest appellate court in the state had discretionary power to review the judgment and no effort was made by the defeated party to get that court to exercise such power); Fisher v. Perkins, 122 U.S. 522, 525 (1887) ("This Court has no power to review any other judgments of the courts of a state than those of the highest court 'in which a decision in the suit could be had'").

Moreover, in an official opinion, the Attorney General of the Commonwealth has determined that a losing party in the Appeals Court must seek further appellate review in the Supreme Judicial Court before applying for review in this Court under 28 U.S.C. §1257:

"Under this provision, if the jurisdiction of the Supreme Judicial Court is properly invoked and it declines to review the judgment of the Appeals Court, the Appeals Court is then the highest court in which a decision could be had. A party would then be free to appeal that decision to the United States Supreme Court. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co. v. Rock, 279 U.S. 410; Prudential Ins. Co. of America v. Cheek, 259 U.S. 530."

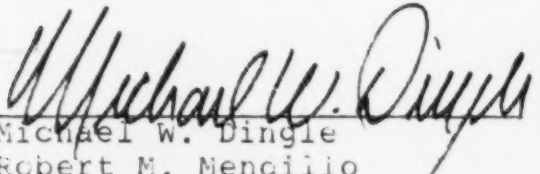
1973 Mass. Att'y Gen. Ann. Rep. 56, 58.

CONCLUSION

For these reasons, the petition for writ of certiorari should be dismissed for want of jurisdiction.

Respectfully submitted,

JAMES M. SHANNON
Attorney General


Michael W. Dingle
Robert M. Mendillo
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

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